United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

77-7201

United States Court of Appeals

FOR THE SECOND CIRCUIT

ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

VS.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE BRITISH EUROPEAN AIRWAYS

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UNITED STATES COURT OF APPEALS
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SECOND CIRCUIT

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United States Court of Appeals

FOR THE SECOND CIRCUIT

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ABRAHAM BENJAMINS, as Personal Representative of the Estate of Hilde Benjamins, deceased,

Plaintiff-Appellant,

vs.

BRITISH EUROPEAN AIRWAYS, HAWKER SIDDELEY AVIATION, LTD., and HAWKER SIDDELEY GROUP, LTD.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE BRITISH EUROPEAN AIRWAYS

Preliminary Statement

This case is here on appeal from an Order dismissing the complaint for lack of federal question jurisdiction under 28 U.S.C. §1331.[1]

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[1] The original Complaint was dismissed for lack of diversity jurisdiction under 28 U.S.C. §1332 in that plaintiff and both defendants are aliens (JA 82). See, *Hodgson & Thompson* v. *Bowerbank*, 9 U.S. (5 Cranch) 303 (1809); *Montalet* v. *Murray*, 8 U.S. (4 Cranch) 46 (1807); *Compagnie Nationale Air France* v. *Castano*, 358 F.2d 203, 206 (1st Cir. 1966); *Kavourgias* v. *Nicholaou Co.*, 148 F.2d 96 (9th Cir. 1945); *Ex parte Edelstein*, 30 F.2d 636 (2d Cir.), *cert. denied, sub nom., Edelstein* v. *Goddard*, 279 U.S. 851 (1929); *Djundjev* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 8 Av.

The District Court, per Jack B. Weinstein, J., held that the Warsaw Convention[2] does not create a right of action for wrongful death so as to confer federal question jurisdiction on the District Court under 28 U.S.C. §1331. The Order of Dismissal appears at JA75 and the oral decision of the District Court appears at JA78-79.

I

Counter Statement of the Issues Presented for Review

1. Does the Warsaw Convention create a right of action for wrongful death so as to confer federal question jurisdiction upon the United States District Courts under 28 U.S.C. §1331?

2. Where the provisions of the Warsaw Convention apply to the rights of the parties in an action for wrongful death and the plaintiff is an alien, can jurisdiction in the United States District Courts be founded upon 28 U.S.C. §1350?

Cas. 18,052 (S.D.N.Y. 1964); *Dassigienis* v. *Cosmos Carriers & Trading Corp.*, 321 F. Supp. 1253 (S.D.N.Y. 1970), *aff'd*, 442 F.2d 1016 (2d Cir. 1971); *Tsitsinakis* v. *Simpson, Spence & Young*, 90 F.Supp. 578 (S.D.N.Y. 1950). However, plaintiff-appellant has not raised on this Appeal any question regarding the dismissal of the original Complaint for lack of diversity jurisdiction.

[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000; T.S. 876 (1934). For two recent decisions of this Court in which the purpose and scope of the Warsaw Convention have been examined, see, *Reed* v. *Wiser*, —— F.2d ——, 14 Av. L. Rep. (CCH) 17,841 (2d Cir. Docket No. 76-7247, April 26, 1977) and *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976).

II

Statement of the Case

1. *The Nature of the Case.*

This is a wrongful death action brought by appellant to recover damages for the death of his wife in an accident involving an aircraft of appellee British European Airways (hereinafter BEA) which occurred shortly after take-off from Heathrow Airport, London, England, on June 18, 1972. Both BEA and the manufacturer[3] of the aircraft involved were joined as defendants.

2. *The Course of the Proceedings.*

This is one of several cases filed in United States District Courts arising out of the same aviation accident, all of which were consolidated in the Eastern District of New York pursuant to 28 U.S.C. §1407 for consolidated and coordinated pretrial and discovery proceedings.

Following the conclusion of the discovery proceedings relating to the common liability issue, the oral deposition of appellant Abraham Benjamins was taken in relation to the issue of damages in his particular case. At this deposition, Benjamins testified that he is not a citizen of the United States but is in fact a Dutch citizen (JA74). Benjamins also testified that his deceased wife was not a United States citizen but was a Dutch citizen at the time of her death (JA73-4).

Since the only jurisdictional basis alleged in the original Complaint was diversity of citizenship between the parties under 28 U.S.C. §1332 and, further, since defendants BEA

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[3] Hawker Siddeley Aviation, Ltd. and Hawker Siddeley Group, Ltd., herein collectively referred to as HSA.

and HSA were aliens like plaintiff and his deceased wife, a motion was brought to dismiss the Complaint for lack of jurisdiction. This motion was granted by the District Court (JA44, 56, 82). Plaintiff Benjamins was granted leave to file an Amended Complaint alleging federal question jurisdiction under 28 U.S.C. §1331. Thereafter, an Amended Complaint was filed alleging as the bases for jurisdiction in the District Court:

1. federal question jurisdiction under 28 U.S.C. §1331;
2. 28 U.S.C. §1337; and
3. 28 U.S.C. §1350.

3. *The Disposition in the Court Below.*

Following the dismissal of the original Complaint for lack of diversity jurisdiction and the filing of an Amended Complaint alleging federal question jurisdiction, the District Court deemed that the Motion to Dismiss the original Complaint likewise was addressed to the Amended Complaint. The federal question jurisdictional basis, or lack of it, was briefed and argued by the parties, following which the District Court, in an oral decision, dismissed the Amended Complaint for lack of federal question jurisdiction (JA78-9). Specifically, the District Court believed itself bound by prior decisions of this Court[4] to the effect that the Warsaw Convention does not create a cause of action for wrongful death and, accordingly, dismissed the Amended Complaint for lack of jurisdiction (JA78-9, 83).

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[4] *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973).

The Order of Dismissal was filed on March 17, 1977, (JA75) and this Appeal from that Order followed (JA84).[5]

4. *Statement of the Facts Relevant to the Issues Presented for Review.*

Plaintiff Benjamins, although a resident of California, is not a citizen of the United States but is a citizen of the Netherlands and was so when the action was commenced (JA74). Similarly, his deceased wife was a citizen of the Netherlands at the time of her death (JA73-4).

The passenger ticket pursuant to which Benjamins' deceased wife was travelling at the time of her death was purchased in Los Angeles and provided for international transportation within the meaning of Article 1 of the Warsaw Convention (JA10-11, 19-20). It is undisputed that the provisions of the Warsaw Convention apply to the rights of Benjamins as against BEA in this case.

Defendants-Appellees BEA and HSA both are corporations organized and existing under the laws of the United Kingdom and have their principal places of business there (JA1, 8, 17).

The accident resulting in the death of Benjamins' decedent occurred in England on June 18, 1972 (JA2, 10-11, 20).

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[5] While the Notice of Appeal is dated April 12, 1977, and appears to have been mailed to counsel for defendants-appellees on that date (JA 85), the Notice of Appeal does not appear to have been received by the Clerk of the District Court until April 20, 1977 (JA 83), more than 30 days after the entry of the Order of Dismissal on March 17, 1977 (JA 75). This raises the preliminary but substantial question as to whether the Notice of Appeal was timely filed within the meaning of Federal Rules of Appellate Procedure 4(a) and 25(a).

ARGUMENT

POINT I

The Warsaw Convention Does Not Create a Cause of Action for Wrongful Death and Jurisdiction, Therefore, Cannot Be Founded Either Upon 28 U.S.C. §1331 or §1337.

The basic provision of the Warsaw Convention dealing with a carrier's liability for the death of a passenger is Article 17, which reads:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 17 has consistently been regarded as creating merely a presumption of liability on the part of the carrier for damages sustained by reason of the death or personal injury of a passenger. See, *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 (9th Cir.), *cert. denied*, —— U.S. ——, 45 U.S.L.W. 3807 (June 13, 1977); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702, 706 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); *Grey* v. *American Airlines, Inc.*, 227 F.2d 282, 285 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956); *Zousmer* v. *Canadian Pacific Air Lines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969); *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954).

This view taken by the Courts of the effect of Article 17 is entirely consistent with that taken by the Executive Branch of the Government when seeking the advice and consent of the Senate to ratification of adherence to the Warsaw Convention in 1934. When the Warsaw Convention was transmitted to the Senate for advice and consent, the accompanying report to the President from the Secretary of State said with respect to Article 17:

> The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier.

1934 U.S. Av. R. 239, 243. See, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, *Sen. Exec. Doc. No. G*, 73d Cong., 2d Sess. (1934).

Each court which has had occasion to consider the question has concluded that Article 17 does not create a cause of action for wrongful death but merely serves to create presumptive liability on the part of the carrier where death occurs as a result of an accident in a certain location. See, *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256, 1258 n. 2 (9th Cir.), *cert. denied*, —— U.S. ——, 45 U.S.L.W. 3807 (June 13, 1977); *Husserl* v. *Swiss Air Transport. Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); *Zousmer* v. *Canadian Pacific Air Lines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969); *Notarian* v. *Trans World Airlines, Inc.*, 244 F.Supp. 874 (W.D. Pa. 1965); *Winsor* v. *United Air Lines, Inc.*, 159 F.Supp. 856 (D.

Del. 1958); *Fernandez* v. *Linea Aeropostal Venezolana*, 156 F.Supp. 94 (S.D.N.Y. 1957); *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954); *Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963 (S.C. N.Y.Cty. 1943), *aff'd*, 267 App. Div. 947 (1944), *aff'd*, 293 N.Y. 878 (1944), *cert. denied*, 324 U.S. 882 (1945).

In *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957), this Court held that the Warsaw Convention did not create a cause of action for wrongful death and dismissed one count based upon the Convention for failure to state a claim:

> [W]e agree with our prior decision in *Komlos* . . . that the Convention did not create an independent right of action . . . . [T]he effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to to grant the right of action. As one authority has stated, the purpose of the Convention was only "to effect a uniformity of procedure and remedies."

247 F.2d at 679.

As the Court stated in *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973):

> . . . the Convention does not "exclusively regulate" the relationship between passenger and carrier on an international flight, but rather sets limits on and renders uniform certain of the aspects of that relationship. [Citations omitted.] Indeed, it has been held that the Convention creates no new right of action,

> but rather creates ". . . a presumption of liability, leaving it for local law to grant the right of action."

351 F.Supp. at 706.

Also in *Maugnie* v. *Compagnie Nationale Air France*, 549 F.2d 1256 (9th Cir.), *cert. denied*, —— U.S. —— (1977), the Court, citing the *Noel, Komlos* and *Husserl* decisions of this Court, stated in this connection:

> It is true that the Warsaw Convention does not create a cause of action, but merely creates a presumption of liability if the otherwise applicable substantive law provides a claim for relief based on the injury alleged.

549 F.2d at 1258, n.2.

In *Zousmer* v. *Canadian Pacific Air Lines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969), Canadian Pacific attempted to remove the case upon the basis that the action arose under a treaty of the United States—the Warsaw Convention. The Court phrased the question presented by the removal petition as being whether a claim grounded on the Warsaw Convention presents a claim or right arising under a treaty of the United States within the scope of 28 U.S.C. §1331. The Court concluded, applying the *Noel* case, that the Warsaw Convention did not in and of itself create an independent cause of action and, therefore, removal under 28 U.S.C. §1331 was not proper. The Court cited *Gully* v. *First National Bank*, 299 U.S. 109 (1936), in support of the proposition that the treaty or law in question must clearly create the actual right asserted and that such right must be an essential factor in the case before it can be said that the case "arises under" a law or treaty of the United States for jurisdictional purposes.

In *Gully* v. *First National Bank, supra,* the Supreme Court stated on this subject:

> How and when a case arises "under the Constitution or laws of the United States" has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's causes of action. [Citations omitted.] The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another.

299 U.S. at 112.

In *Zousmer,* the Court found that the Warsaw Convention did not create an essential element of the plaintiff's cause of action for wrongful death. At most, the Convention created a presumption of liability applicable to an air carrier in a wrongful death action brought pursuant to a specific statute creating the right of action. The Convention merely established uniform rules for the determination and enforcement of the carrier's liability, leaving to local law the creation of the right to bring the action. Thus, the Court concluded, plaintiff's right of action for the wrongful death of a passenger in "international transportation" does not arise under the Convention so as to confer federal question jurisdiction upon the Court under 28 U.S.C. §1331.

The very language of the Warsaw Convention indicates that its drafters refrained from legislating on certain matters traditionally considered vital to the creation of a new cause of action. For example, the drafters of the Convention did not prescribe the person or persons entitled to

bring suit. 49 Stat. 3020. *Reed* v. *Wiser*, —— F.2d ——, 14 Av. L. Rep. (CCH) 17,841 (2d Cir. Docket No. 76-7247, April 26, 1977); *Zousmer* v. *Canadian Pacific Air Lines, Ltd.*, 307 F.Supp. 892 (S.D.N.Y. 1969); *Komlos* v. *Compagnie Nationale Air France*, 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds*, 209 F.2d 436 (2d Cir. 1953), *cert. denied*, 348 U.S. 819 (1954).

The items of damage recoverable in a death case and the proper beneficiaries of an award, traditional matters dealt with in wrongful death statutes, are issues left by the Warsaw Convention to the internal law of the parties to the Convention. See *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851, 858 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965). As was succinctly stated by the Court in the *Wyman* case, *supra*:

> No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of the existing legal rights and remedies.

Wyman v. *Pan American Airways, Inc.*, *supra*, 181 Misc. 963 at 966.

Recent decisions by this Court have affirmed the principle that the Warsaw Convention did not create new substantive rights; rather, "the Convention must be read in the context of the national legal systems of all its members," *Reed* v. *Wiser*, —— F.2d ——, 14 Av. L. Rep. (CCH) 17,841 (2d Cir. Docket No. 76-7247, April 26, 1977), in view of the intention of its drafters "to create a uniform system of liability rules governing fundamental aspects of international air disaster litigation." *Reed* v. *Wiser*, *supra*; *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 38 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976); *Karfunkel* v. *Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977).

The 1966 Intercarrier Agreement referred to as the Montreal Agreement,[6] could not and did not change the meaning and scope of Article 17 of the Warsaw Convention. *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976); *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702, 707 (S.D. N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *MacDonald* v. *Air Canada*, 439 F.2d 1402, 1405 n. (1st Cir. 1971). The *effect* of the Montreal Agreement on the carrier's liability is simply to render the presumptive liability of Article 17 absolute under certain limited circumstances. See, *Karfunkel* v. *Compagnie Nationale Air France*, 427 F.Supp. 971 (S.D.N.Y. 1977).

Appellant infers, at pp. 36-38 of his Brief, that the Montreal Agreement is either a treaty of the United States or part of the Federal Aviation Act, thus conferring federal question jurisdiction pursuant to 28 U.S.C. §1331. Both inferences are incorrect. The Montreal Agreement is not a treaty of the United States within the meaning of Article VI of the Constitution, *Husserl* v. *Swiss Air Transport Co.*, 351 F.Supp. 702 at 707 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973); *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1975), *cert. denied*, 425 U.S. 989 (1976); *Karfunkel* v. *Compagnie Nationale Air France*, 427 F. Supp. 971 (S.D.N.Y. 1977); and BEA, as a foreign air carrier not operating flights to or from the United States, *Lanza* v. *British European Airways*, 18 F.R.Serv.2d 1250 (E.D.N.Y. 1974), is not a "foreign air carrier" within the meaning of the Act, 49 U.S.C. §1301(19), and hence is not subject to the provisions of the Federal Aviation Act. See, *Pan American Airways, Inc.* v. *United States*, 150 F.Supp.

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[6] Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18900, approved by Order E-28680, May 13, 1966, CAB Docket 17325.

569 (U.S. Cust. Ct. 1957); *Canadian Colonial Airways, Inc. —Investigation*, 2 C.A.B. 752 (1941).

Since the Federal Aviation Act, 49 U.S.C. §1301 *et seq.*, has no application to this action, 28 U.S.C. §1337 cannot serve as the jurisdictional base for this controversy.

Although the treaty jurisdiction requirements of Article 28 of the Warsaw Convention are met in this case,[7] the domestic federal jurisdictional prerequisites set forth in 28 U.S.C. §§1331 and 1332 must still be satisfied. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 802 (2d Cir. 1971). Where they are not and cannot be satisfied, due to lack of proper diversity or federal question jurisdiction, as in the instant case, the District Court must dismiss the complaint for lack of jurisdiction. In so doing, the Court below was correct and the Order of Dismissal should be affirmed.

POINT II

28 U.S.C. §1350 Cannot Serve as the Basis of Jurisdiction Merely Because the Provisions of a Treaty, the Warsaw Convention, Are Applicable to the Rights of the Parties.

Appellant urges that the District Court has jurisdiction of this action by virtue of 28 U.S.C. §1350 which provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.

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[7] Plaintiff's decedent purchased her ticket in Los Angeles, thereby rendering the United States one of the places where treaty jurisdiction would properly lie on the international level within the meaning of Article 28. *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 814-15 (2d Cir. 1966).

This statute deals primarily with the relationship among nations rather than among individuals, *Dreyfus* v. *Von Finck*, 534 F.2d 24 (2d Cir. 1976), and permits suits in the District Courts between aliens where the cause of action alleged is for a tort only. *O'Reilly de Camara* v. *Brooke*, 209 U.S. 45 (1908). However, the statute requires that the tortious act be committed either in violation of the law of nations or a treaty of the United States. *Khedivial Line, S.A.E.* v. *Seafarers' International Union*, 278 F.2d 49 (2d Cir. 1960); *Lopes* v. *Reederei Richard Schroder*, 225 F.Supp. 292 (E.D. Pa. 1963); *Damaskinos* v. *Societa Navigacion Interamericana, S.A., Panama*, 255 F.Supp. 919 (S.D.N.Y. 1966).

The test for determining whether a tort violates a treaty of the United States within the meaning of 28 U.S.C. §1350 is whether the treaty creates a cause of action in favor of the injured party. In *Damaskinos* v. *Societa Navigacion Interamericana, S.A., Panama*, 255 F.Supp. 919 (S.D.N.Y. 1966), a Greek seaman sought to recover damages for personal injuries sustained while he was a crew member aboard a Liberian vessel. He claimed that the Court had jurisdiction by virtue of a treaty made by the United States with Greece granting Greek nationals "most favored nation" treatment with regard to access to the United States Courts. However, the Court held that the "most favored nation" agreement did not support subject matter jurisdiction under 28 U.S.C. §1350 because:

> This treaty merely affords Greek nationals a right of access to United States courts "in pursuit of their rights." If they have no enforceable rights, their opportunity for access to the courts is unimportant. *The treaty does not create a cause of action.* It has nothing to do with the negligence of shipowners or the unseaworthiness of their vessels. Obviously, the treaty does not entitle a Greek national to maintain an action in

> a United States court regardless of whether there is any proper basis for his claim.

255 F.Supp. at 923. (Emphasis supplied.)

It cannot correctly be said that a wrongful death action by an alien which is subject to the provisions of the Warsaw Convention is an action "for a tort . . . committed in violation of the law of nations or a treaty of the United States" within the meaning of 28 U.S.C. §1350.

The Warsaw Convention does not establish any standards of conduct, the violation of which gives rise to a cause of action. It is well recognized that the Warsaw Convention does not create a cause of action but merely sets forth uniform rules to be applied in determining the liability of an air carrier within the framework of existing legal rights and remedies. See, *Noel* v. *Linea Aeropostal Venezolana,* 247 F.2d 677 (2d Cir.), *cert. denied,* 355 U.S. 907 (1957); *Husserl* v. *Swiss Air Transport Co.,* 351 F.Supp. 702 (S.D.N.Y. 1972), *aff'd.,* 485 F.2d 1240 (2d Cir. 1973); *Zousmer* v. *Canadian Pacific Air Lines, Ltd.,* 307 F.Supp. 892 (S.D.N.Y. 1969); *Notarian* v. *Trans World Airlines, Inc.,* 244 F.Supp. 874 (W.D. Pa. 1965); *Winsor* v. *United Air Lines, Inc.,* 159 F.Supp. 856 (D. Del. 1958); *Fernandez* v. *Linea Aeropostal Venezolana,* 156 F.Supp. 94 (S.D.N.Y. 1957); *Komlos* v. *Compagnie Nationale Air France,* 111 F.Supp. 393 (S.D.N.Y. 1952), *rev'd on other grounds,* 209 F.2d 436 (2d Cir. 1953), *cert. denied,* 348 U.S. 819 (1954); *Wyman* v. *Pan American Airways, Inc.,* 181 Misc. 963 (S.C. N.Y. Cty. 1943), *aff'd.,* 267 App. Div. 947 (1944), *aff'd,* 293 N.Y. 878 (1944), *cert. denied,* 324 U.S. 882 (1945).

Two recent decisions of this Court have considered 28 U.S.C. §1350 and both have rejected the notion that the statute vests a plaintiff with individual legal rights. *Dreyfus*

v. *Von Finck,* 534 F.2d 24 (2d Cir. 1976); *IIT* v. *Vencap, Ltd.,* 519 F.2d 1001 (2d Cir. 1975). As this Court held in *IIT* v. *Vencap, Ltd., supra*:

> We cannot subscribe to plaintiffs' view that the Eighth Commandment "Thou shalt not steal" is part of the law of nations. While every civilized nation doubtless has this as a part of its legal system, a violation of the law of nations arises only when there has been a "violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those states for their common good and/or in dealings *inter se.*"

519 F.2d at 1015.

A tort committed in violation of the law of nations within the meaning of 28 U.S.C. §1350 generally has been analogized to a criminal offense. *Hilton* v. *Guyot,* 159 U.S. 113 (1895); *United States* v. *Arjona,* 120 U.S. 479 (1887); *Abdul-Rahman Omar Adra* v. *Clift,* 195 F.Supp. 857 (D. Md. 1961).

The alleged negligence and wilful misconduct of BEA is not a violation of the law of nations within the scope of 28 U.S.C. §1350 so as to vest this Court with subject matter jurisdiction of the within action for wrongful death. *Damaskinos* v. *Societa Navigacion Interamericana, S.A., Panama,* 255 F.Supp. 919 (S.D.N.Y. 1966); *Lopes* v. *Reederei Richard Schroder,* 225 F.Supp. 292 (E.D. Pa. 1963). As was stated by the Court in the *Lopes* case:

> Nothing has been found to indicate that negligence such as is alleged in this action, was in 1789 and succeeding years, or is, customarily treated as a violation of the law of nations.

225 F.Supp. at 297.

CONCLUSION

The Order of Dismissal Should Be Affirmed in All Respects.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

State of New York,
City of New York,
County of New York, ss.:

KATHLEEN A. HORTON, being duly sworn, deposes and says that she is over 18 years of age. That on the 29th day of July, 1977, she served 3 copies of Appellee's Brief upon:

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New York, New York 10005

RONALD L. M. GOLDMAN & ASSOCIATES
13737 Fiji Way
Marina del Rey, California 90291

by depositing 3 copies of the same securely enclosed in a postpaid wrapper in a branch depository maintained and exclusively controlled by the United States Post Office at Canal & Church Street, N.Y.C., addressed to said attorneys for the above named, that being the address within the state designated by them for that purpose upon the preceding papers as the place where they regularly kept office and at which place they regularly received mail.

Sworn to before me this

29th day of July, 1977

Sylvia Morris

SYLVIA MORRIS
Notary Public, State of New York
No. 31-4526651
Qualified in New York County
Commission Expires March 30, 1978

Kathleen A. Horton

KATHLEEN A. HORTON